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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOEL GRIMALDO,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS
BOARD et al.,

Respondents.

B208959

(WCAB No. LBO 0370243)

PROCEEDING to review a decision of the Workers' Compensation Appeals Board. Annulled and remanded.

George Henderson and Elliot S. Berkowitz for Petitioner.

No appearance for Respondent Workers' Compensation Appeals Board.

No appearance for Respondent Abbey Event Services.

Kegel, Tobin & Truce and Victor Sargazy for Respondent American Home Assurance.

Joel Grimaldo filed a petition for writ of review of the Workers' Compensation Appeals Board's (Board) decision finding that his diabetes was not lit up or aggravated by an industrial injury to the foot, and thus had no causal connection to the injury sustained at Abbey Event Services (Abbey). We find that the Board did not rely on substantial medical evidence to support the finding and annul the Board's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Joel Grimaldo worked for four years as an event aide at Abbey, a party rental service. His job was to transport party equipment to the event site. Grimaldo was 36 years old when on or about November 25, 2004, he was injured when a metal grate from a stove fell on his left foot. The record indicates the grate fell from approximately 10 feet and weighed about 60 pounds. There is conflicting evidence as to the extent of the original injury to the left great toe, which was described in the medical evidence variously as a penetration injury, a superficial abrasion, a small cut, a crush injury of the left foot over the left great toe, or merely a minor scratch. Nevertheless, Grimaldo continued working after the initial injury and reported that he had pain daily and a lot of swelling in the great toe when on December 17, 2004, he asked for medical treatment. On that day, Grimaldo slipped at work and noticed an open wound on his left great toe. Grimaldo was off work due to the industrial injury beginning in January 2005 and returned to work at Abbey for two weeks in May 2005. Thereafter, he was laid off.

Grimaldo received conservative treatment without positive effect. As part of the evaluation of his medical condition, his glucose level was tested and was found to be severely elevated, thus providing a diagnosis of uncontrolled diabetes. Also, Grimaldo had altered his gait after the injury because pain in the great toe caused him to put undue pressure on the lateral side of the left foot, which contributed to infections and ulcerations in that area. These infections were chronic and did not heal, which resulted in the need for several surgical amputations.

Raymond Bautista, D.P.M., a treating physician, declared Grimaldo permanent and stationary in a report of February 22, 2006. However, he reported that Grimaldo needed strict management of his diabetes so he could undergo surgery for an infected bone in his left foot. Otherwise, he anticipated that the chronic infection would lead to amputation of the foot.

A trial was held to determine which injuries and/or conditions arose out of and occurred in the course of employment, and all other issues were reserved. Abbey admitted industrial causation to the left foot and great toe, but contended that claims of injury to other parts of the body or other medical conditions were not proximately caused by employment at Abbey. There was no dispute that treatment for a nonindustrial condition was compensable if necessary to cure the effects of the industrial injury.¹

At trial, Grimaldo testified that in 2006, a friend had driven him to Abbey to see if work was available. The facility was closed and Grimaldo walked the three miles home on a painful foot that became severely swollen as a result. Thereafter, Grimaldo got a blister on the bottom of his left foot which became ulcerated. Further treatment for this condition was not successful, and due to Grimaldo's complex medical condition, his left leg was surgically amputated below the knee in May 2007. Abbey argued that the cause of the leg amputation was due to this incident, which occurred after Grimaldo's employment ended at Abbey and after Grimaldo was released from medical care.

The workers' compensation judge (WCJ) issued a decision dated February 26, 2008, which found Grimaldo sustained an industrial injury to his left foot, toe, and "internal organs resulting in diabetes arising out of and occurring in the course of his employment by ABBEY" The WCJ found that overall, the medical evidence

¹ "So long as the treatment is reasonably required to cure or relieve from the effects of the industrial injury, the employer is required to provide the treatment, and treatment for nonindustrial conditions may be required of the employer where it becomes essential in curing or relieving from the effects of the industrial injury itself. (2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation [(2d ed. 1967)] § 16.03[1], [2].)" (*Granado v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 406.)

supported a finding that the injury to the foot lit up a diabetic condition resulting in prolonged and poor healing which led to multiple surgical amputations.

Abbey filed a petition for reconsideration contending the evidence relied upon by the WCJ for the decision was not substantial medical evidence. The Board granted the petition for reconsideration. It rescinded the part of the February 26, 2008 findings of fact that found the diabetes had a causal connection to the industrial injury. The Board instead determined that the weight of the medical evidence compelled the conclusion that the diabetes was preexisting and manifested itself by complicating the healing of the industrial injury to the left foot and contributed to the need for medical treatment, but did not arise out of and occur in the course of Grimaldo's employment at Abbey.

Grimaldo filed this timely petition for review.

DISCUSSION

I. The Evidence Relied Upon by the Board Does Not Constitute Substantial Medical Evidence

The Board relied on the opinion of an internist, Richard Hyman, M.D., which it found was well-reasoned and persuasive. Dr. Hyman first examined Grimaldo on August 29, 2006. Dr. Hyman reported that the diabetes was an incidental finding because of the industrial injury. He reported that the injury was merely a minor scratch and questioned whether an injury actually occurred if there was no break in the skin or only a minor one. He stated further that if there was an injury, it was not significant in any way in the development of the infection of the foot, which had probably been ongoing for a long period of time prior to the injury.

Dr. Hyman's opinion, however, is not supported by the facts or by an adequate medical history and thus, it is the result of speculation and surmise. In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability and based on facts that are germane, with adequate medical histories or examinations and correct legal theories, and not based on surmise, speculation,

conjecture, or guess. (*Escobedo v. Marshalls, CNA Insurance Co.* (2005) 70 Cal.Comp.Cases 604, 620 (en banc).)

The extent of the initial injury caused by the grate from the stove that fell on Grimaldo's left foot differs within the history of the various medical reports. However, the first medical evidence of the injury is a January 3, 2005 report from an industrial clinic which described the injury as an open, ulcerated wound on the left great toe.

Dr. Hyman reported that the diabetes had to have preexisted the job injury since the glucose readings were already significantly elevated just a "short time" after the injury. Dr. Hyman did not define what he meant by a "short time," nor did he explain his conclusions. The medical record shows that the first diagnosis of diabetes was early January of 2005 and the original injury was November 25, 2004. Moreover, there was no evidence that prior to November 25, 2004, Grimaldo had been diagnosed with diabetes or that he had prior symptoms associated with diabetes, or that he had ever experienced trouble with a cut or wound healing. The WCJ reviewed the extensive medical record and did not find any indication that Grimaldo was being treated for diabetes prior to his industrial injury.

Dr. Hyman reported that risk factors of diabetes warranted the conclusion that the diabetes preexisted the industrial injury. The first factor was that Grimaldo's mother had diabetes; however, she was the only known family member with the condition. Furthermore, Dr. Hyman did not state with reasonable medical probability that Grimaldo would have had the onset of diabetes at the time that he did absent the industrial injury.

The second risk factor cited by Dr. Hyman was that Grimaldo was previously 60 pounds heavier. However, Dr. Hyman did not cite the medical evidence supporting this conclusion, nor did he indicate when Grimaldo was heavier. The history in the medical reports from Abbey's own evaluating physicians shows that at Grimaldo's medical examinations from 2005 through 2007, he was five feet eight inches and weighed between 134 to 143 pounds. Accordingly, the medical history presented by Dr. Hyman was not substantiated by the record.

II. A Nonindustrial Condition Lit Up by an Industrial Injury Is Part of the Injury.

“‘Injury’ includes any injury or disease arising out of the employment” (Lab. Code, § 3208.)² To be compensable, an injury must arise out of and occur in the course of employment. (Lab. Code, § 3600.) In order to arise out of employment, the injury must occur by reason of a condition or incident of employment. (*Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223, 225.) “‘Whether a disability results in whole or in part from the normal progress of a preexisting disease or represents a fully compensable lighting up or aggravation of a preexisting condition is a factual question for the commission to determine, and its award will not be annulled if there is any substantial evidence to support it.’” (*Berry v. Workmen’s Comp. App. Bd.* (1968) 68 Cal.2d 786, 789 (*Berry*).)

Well-established authority holds “that the acceleration, aggravation or ‘lighting up’ of a preexisting disease is an injury in the occupation causing the same.” (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617.) The rationale for the doctrine is that the employer takes the employee subject to his medical condition when he begins employment, and that compensation should not be denied because the employee’s medical condition caused a disability from an injury that ordinarily would have caused little or no problems to a person who had no such condition. (*Ibid.*) “Thus, even though an employee’s underlying disease was not caused by his or her employment, the employee’s disability or death is compensable if the disease was aggravated or accelerated by the employee’s work. So, also, the acceleration or aggravation of a preexisting disease by an industrial injury is compensable as an injury arising out of and in the course of the employment, if the aggravation is reasonably attributable to an industrial accident” (65 Cal.Jur.3d (2007) Work Injury Compensation, § 280, p. 431, fns. omitted; see *Smith v. Workmen’s Comp. App. Bd.* (1969) 71 Cal.2d 588, 594-595 [a worker diagnosed with heart disease who subsequently performed physically

² All further statutory references are to the Labor Code.

strenuous work aggravated the damage to the heart which resulted in heart failure]; *Berry, supra*, 68 Cal.2d at p. 788 [the worker had a dormant fungus disease that spread through his bloodstream and the industrial trauma to his knee caused the infection to lodge there and manifest itself].)

Accordingly, the standard is whether the medical evidence indicates that within reasonable medical probability the normal progression of the nonindustrial disease or condition would have resulted in disability regardless of the industrial injury. (See *Berry, supra*, 68 Cal.2d at p. 790.) In his September 8, 2006 report, Dr. Hyman acknowledged that he was asked to address whether the industrial injury worsened Grimaldo's diabetes, which in turn resulted in subsequent problems with chronic infections and problems with healing. He did not address the question directly, and his response to the question was not supported by facts germane to the inquiry. Instead, Dr. Hyman cited medical evidence of treatment less than 24 hours after the industrial injury which he concluded documented an infection and most probably out-of-control diabetes. However, we have reviewed the extensive medical record and do not find Dr. Hyman's statement to be accurate or otherwise supported by the record. Indeed, the basic premise of his opinion, that Grimaldo's symptoms surfaced within 24 hours of his having suffered a minor scratch to his toe, and thus must have been due to his preexisting diabetic condition, is based on false assumptions. Grimaldo sought medical treatment several weeks after he sustained the injury and the first medical report described the injury as an open, ulcerated wound. Moreover, Dr. Hyman's response did not address whether Grimaldo's diabetes was lit up by the injury Abbey concedes was work-related. We determine that Dr. Hyman's conclusions do not provide substantial medical evidence to support the Board's decision.

DISPOSITION

The Board's decision is annulled and the WCJ's decision is reinstated. The matter is remanded to the trial level for further proceedings on the remaining issues.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.